Supreme Court, U.S.
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No. 96-670

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1996

MURPHY J. FOSTER, JR. in his official capacity as Governor of Louisiana and W. FOX McKEITHEN, in his official capacity as Secretary of State of Louisiana

Petitioners,

v.

G. SCOTT LOVE, PAUL S. BERGERON, KATHLEEN B. BALHOFF, and BENNIE BAKER-BOURGEOIS

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-QUESTION PRESENTED

Whether Louisiana Revised Statutes §§18:511(A), 18:1272(A), and 18:402(B)(1), which in combination permit congressional elections to occur on the first Saturday of October of an election year, violate 2 U.S.C. §§ 1 and 7, which require that congressional elections occur on the "Tuesday next after the first Monday in November" of an election year.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those provisions cited by Petitioners, Respondents direct the Court's attention to 2 U.S.C. § 8, which provides:

> The time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively.

COUNTER-STATEMENT OF THE CASE

This case involves a challenge to the *timing* of Louisiana's congressional open primary, which permits conclusive congressional elections on the first Saturday in October of election years. The Respondents commenced this action for declaratory and injunctive relief under 42 U.S.C. § 1983 on August 8, 1995 in the United States District Court for the Middle District of Louisiana.

The parties promptly filed cross-motions for summary judgment, and the Respondents also moved for expedited consideration of the matter pursuant to FED. R. CIV. P. 57. The district court granted the motion for expedited consideration, and heard argument on October 23, 1995, at which time the court took the matter under advisement.

On April 11, 1996 the district court issued a one-page "Ruling on Cross Motions for Summary Judgment." In a one-paragraph discussion of the merits, the ruling stated:

> This matter is before the Court on cross motions for summary judgment. After reviewing the record, the Court finds that there are no genuine issues of material fact, and that the defendants are entitled to judgment as a matter of law. The Court specifically finds that Louisiana's method of conducting Congressional elections does not violate the laws

> and Constitution of the United States.

Petitioners' Appendix B, p. App. 24.

The same day the district court entered a separate final judgment in Petitioners' favor.

On April 24, 1996, Respondents filed their notice of appeal in the district court. On April 25, 1996, Respondents filed an emergency motion for expedited appeal, which the court of appeals granted on April 26, 1996. Under the expedited briefing and argument schedule, argument in the court of appeals was held on July 8, 1996.

On July 30, 1996, a divided panel of the court of appeals reversed the district court and issued a declaratory judgment "that Louisiana's election scheme conflicts with 2 U.S.C. §§ 1, 7 to the extent that the Louisiana scheme authorizes a contested election for members of Congress to be decided in the open primary before the uniform federal election day." *Love v. Foster*, 90 F.3d 1026, 1031 (5th Cir. 1996); Petitioners' Appendix A, p. App. 11. The court of appeals, declined, however, to award any immediate injunctive relief because of the disruptive effect such an injunction would have had on Louisiana's then-impending 1996 congressional elections, and remanded the case to the district court with instructions to consider injunctive relief if the Louisiana Legislature did not act to correct the problem in its 1997 session. *Id.* at 1031-32; Petitioners' Appendix A, pp. App. 11-12.

On August 13, 1996, Petitioners filed a suggestion for rehearing en banc in the court of appeals. Under 5TH CIR. R. 35.6 (Internal Operating Procedure accompanying Rule), a suggestion for rehearing en banc is also treated as a petition for panel rehearing.

On October 28, 1996, Petitioners filed a petition for writ of certiorari in this Court.

On November 15, 1996, the court of appeals denied Petitioners' suggestion for rehearing en banc and petition for panel rehearing, with three members of the full court dissenting from the denial of rehearing en banc. *Love v. Foster*, 100 F.3d 413 (5th Cir. 1996) (per curiam); Petitioners' Supplemental Appendix. In response to the petition for panel rehearing, the panel stated that

> all we hold is that Louisiana's election plan, to the extent that it precludes any legal election for United States Representatives and Senators on Federal Election Day, conflicts with 2 U.S.C. §§ 1 and 7, and is invalid. Also, we do not suggest that Louisiana may not retain its open primary system. One way it can retain this system and avoid any conflict with the federal statute is to hold the open primary on Federal Election Day and provide for a runoff election between November and January when the elected

member of Congress takes office. *See* 2 U.S.C. § 8.

Id. at 413-14; Petitioners' Supplemental Appendix, pp. 1-2.

REASONS FOR DENYING THE WRIT

Contrary to Petitioners' assertions, this case is not about Louisiana's authority to determine the *manner* in which it conducts its congressional elections. This case is about the *timing* of Louisiana's congressional open primary, and specifically, whether such primary, as a potentially *conclusive* congressional election, can, consistent with federal law, be held on the first Saturday in October as opposed to the "Tuesday next after the first Monday in November" specified by 2 U.S.C. §§ 1, 7 ("federal election day"). This Court should deny the writ because (1) whether Louisiana holds its congressional primary in November (as opposed to October) is not an important question of federal law worthy of this Court's attention, and (2) the Louisiana statutes in question plainly conflict with the relevant federal law.

In combination, La. R.S. §§ 18:511(A), 18:402(B)(1), and 18:1272(A) permit conclusive congressional elections on the first Saturday in October whenever a candidate receives a majority of

the votes cast in the congressional open primary.[1] On their face, these statutes conflict with the clear, unambiguous language of 2 U.S.C. §§1 and 7, which require that congressional elections be held on federal election day in November. The court of appeals correctly entered a declaratory judgment in favor of Respondents.

As the court of appeals panel made perfectly clear in its denial of the petition for panel rehearing, Louisiana may retain its present "open primary" system for congressional elections, so long as the Louisiana Legislature adjusts the dates so that the open primary, as a potentially conclusive congressional election, is held on federal election day in November (as required by 2 U.S.C. §§ 1 and 7) and any required run-off election (necessitated by a "failure to elect" on federal election day when no candidate obtains a majority of the votes cast) is held thereafter, as permitted by 2 U.S.C. § 8. *See Public Citizen v. Miller*, 813 F. Supp. 821 (N.D. Ga.), *aff'd*, 992 F.2d 1548 (11th Cir. 1993) (upholding post-federal election day U. S. Senate run-off election necessitated by a "failure to elect" on federal election day).

There is no suggestion by Petitioners, nor could there be, that the court of appeals' decision below conflicts with the decision of any state court of last resort or any other federal appeals court, that the

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[1] In the event that no candidate receives a majority of the votes cast in the congressional primary, a run-off election between the top two vote-getter is held on federal election day. La. R.S. § 18:1271.

decision below conflicts with the relevant decisions of this Court, or that the decision below so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. *See* SUP. CT. R. 10 (outlining considerations governing review on certiorari). Petitioner's only proffered basis for this Court's exercise of its certiorari jurisdiction is that the court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court.

Respondents respectfully submit that whether Louisiana holds its congressional primary on federal election day in November (as required by the decision below, if Louisiana is to maintain its open primary system), as opposed to the first Saturday in October (as prescribed by existing Louisiana law), is not an important issue of federal law worthy of this Court's time and attention. At issue is simply the *time* at which Louisiana holds its congressional open primary. No other state is affected by the decision below because, to Respondents' knowledge, no other state permits conclusive congressional elections prior to federal election day.

In any event, Louisiana's election system plainly conflicts with federal law, and therefore must yield under the Supremacy Clause. Because the merits are so clear, this Court need not exercise its certiorari jurisdiction.

CONCLUSION

For the reasons provided above, Respondents request that the Writ be denied.

Dated: February 3, 1997

Respectfully submitted,

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